Book Reviews

Feminism's Return to Liberalism

Feminist Legal Theory: Readings in Law and Gender. Edited by: Katharine T. Bartlett* & Rosanne Kennedy.** Boulder, CO: Westview Press, 1991. Pp. xii, 446. \$59.25 (cloth), \$18.95 (paper).

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*Feminist Legal Theory*¹ is a collection of previously published essays, and in that literal sense the book contains nothing new. Yet what the book accomplishes by drawing together some of the best scholarship in this field goes beyond its immediate virtues of good editing and convenient organization. Its publication, one year ago, marks the establishment of feminist legal theory as an independent enterprise at the forefront of contemporary jurisprudential thought. This comprehensive volume of eighteen essays gives a name to the feminist academic pursuit in law, and creates its canon.

One need not read very far into this volume, however, to discover that a formidable contradiction exists between the promise of *Feminist Legal Theory* and its individual essays. If the presentation of this collection suggests a coming together of ideas, the development of an overarching theoretical

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1. FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) [hereinafter FEMINIST LEGAL THEORY].

framework for addressing questions of gender in law, the essays themselves move in the opposite direction toward a commitment to greater and greater particularity, a surrender to multiple truths and splintered subjectivities. Many of the theorists represented in this volume are at the point of questioning the usefulness of the category Woman in a world of radical diversity; they now ask how it is possible to construct a feminist politics when women themselves differ in so many overlapping ways. The uneasy relationship between the unifying theme of the book as a whole and the divisive drive of the individual essays reflects a central and paradoxical question animating feminist legal thought: how can we recognize difference without destroying the possibility for meaningful political, legal, and human connection? Can a principle of difference itself be the tie that binds?

Modern feminist theory has always been preoccupied with the issue of difference. Feminists at first focused on the way in which women were not different from men, and then on the way in which they were different. But a turning point came when some feminist theorists—primarily women of color—began to explore the ways in which women differed from each other. As the critical gaze of feminism has turned inward, the differences among women have seemed to overwhelm any shared gender identity. Efforts to define a female nature or shared female qualities have been met with the charge of “essentialism.”² And the anti-essentialist critique has not confined itself to the category Woman. Armed with the tools of deconstructive analysis and personal narrative, anti-essentialist feminists have turned to dismantling the idea of a coherent, integrated self. Difference is no longer only that which separates men from women, or women from each other, but me from myself.

The publication of *Feminist Legal Theory* is thus simultaneously an event of great achievement and of great angst. How did we arrive at the point where feminist theory must struggle with the demon of its own authority? How have we come to question the authenticity of the female condition? And how has the most recent work of feminist theorists attempted to resolve these issues? Using *Feminist Legal Theory* as my guide, I begin this Book Review by tracing the development of the principle of difference in feminist legal theory, describing its culmination in the forceful, if destructive, anti-essentialist critique. In the second Part, I discuss the turn to narrative in the work of some feminist theorists and their appeal to the reconstructive ideal of connection across differences. In Part III, I suggest that, to the extent that any one political theme may be said to emerge from the most recent essays in this book, it is a theme closely resembling the liberal principle of diversity. The difference debate has led feminism toward the articulation of a renewed liberalism, a redeemed liberalism in which the philosophy of possessive individualism

2. See *infra* text accompanying note 29.

characteristic of classical liberalism³ has been tempered by a principle of empathy. Distinguished by its commitment to individual diversity within community, empathetic liberalism may not be a radically new approach.⁴ But I believe it offers law's best hope for justice founded upon true social equality.

I. DIFFERENCE AND THE ANTI-ESSENTIALIST ABYSS

Katharine Bartlett and Rosanne Kennedy order the essays in *Feminist Legal Theory* in a sequence that reflects a now common account of the history of feminist legal theory as developing around the unfolding principle of "difference."⁵ Feminist legal theory was conceived at the moment when significant numbers of women entered the legal academy in the late 1960's and began to ask "the woman question."⁶ Their efforts were directed at uncovering the ways in which law discriminated against women by denying them rights accorded to men. Feminists now view this first generation as having pursued a traditional liberal model of equality, a model premised on the notion that women and men are in all important respects the same and should be treated the same under law. Accordingly, the book opens with Wendy Williams' essay "The Equality Crisis,"⁷ which describes the successes of the traditional liberal doctrine of equal treatment beginning with the Supreme Court's repudiation of the separate spheres ideology in *Reed v. Reed*⁸ and continuing in a line of cases overturning laws "premised on the old breadwinner-homemaker, master-dependent dichotomy."⁹ Williams' defense of traditional liberalism calls for

3. See CRAWFORD B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962).

4. Nor is the effort to rework liberalism a uniquely feminist enterprise. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986) (articulating liberal pluralist, yet anti-individualistic, moral philosophy); LIBERALISM AND THE MORAL LIFE (Nancy L. Rosenblum ed., 1989). Feminists are, however, at the forefront of this endeavor. See, e.g., Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989).

5. A similar historical understanding underlies the content of some of the essays in this book. See, e.g., Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, in FEMINIST LEGAL THEORY 263, 264-68 (originally published at 4 BERKELEY WOMEN'S L.J. 191 (1989-90)); see also Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1 (1987-88). This account is not the only story one could tell about the development of feminist legal theory. Alternative interpretations of the same body of work have stressed different themes and assessed the current condition of feminist legal theory from a different angle. See, e.g., Robin West, *Jurisprudence and Gender*, in FEMINIST LEGAL THEORY 201, 206-23 (originally published at 55 U. CHI. L. REV. 1 (1988)).

6. Katharine T. Bartlett, *Feminist Legal Methods*, in FEMINIST LEGAL THEORY 370, 371 (originally published at 103 HARV. L. REV. 829 (1990)) (citing, as first use of the term "woman question," SIMONE DE BEAUVOIR, *THE SECOND SEX* xxxviii (H.M. Parshley ed. & trans., Vintage Books 1989) (1949)).

7. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, in FEMINIST LEGAL THEORY 15 (originally published at 7 WOMEN'S RIGHTS L. RPTR. 175 (1982)).

8. 404 U.S. 71 (1971).

9. Wendy Williams, *supra* note 7, at 17. Williams summarizes the doctrinal successes of the traditional liberal approach:

[T]he Supreme Court insisted that women wage earners receive the same benefits for their families under military, social security, welfare, and workers compensation programs as did male wage earners; that men receive the same child care allowance when their spouses died as women did; that the female children of divorce be entitled to support for the same length of

the elimination of what she views as the cultural limitations of gender; she would require a gender-neutral approach to laws governing military inscription, statutory rape, and pregnancy leave.¹⁰ She wants to make it possible for women to assume the risks and responsibilities of military service¹¹ and for men to experience the bond of infant love.¹²

The liberal model in its purest form could not stand unchallenged for long. Feminists soon recognized that its basic insight—that women are in all relevant respects the same as men—had liberating power only as long as the legal context did not directly involve women's sexuality or reproductive capacities.¹³ In the employment context, for example, adherence to gender-neutrality was widely viewed as harming women by denying them benefits associated with pregnancy. The reality of women's physical difference from men thus prompted some feminist theorists to seek "special treatment" in limited areas related to reproduction; they supported, for example, a reading of the Pregnancy Discrimination Act that would allow employers to provide benefits related to pregnancy.¹⁴ This emerging "difference model," while straining to remain within the traditional liberal framework, required that the law take account of and accommodate women's physical deviation from the male norm.

The demand for recognition of women's physical differences from men was modern legal feminism's first move in the direction of seeking greater particularity in law. For traditional liberal theorists like Wendy Williams, however, greater particularity serves only to reinforce gender stereotypes. In her view, for example, women seeking special treatment on the basis of "real differences" must be willing to accept laws that harm as well as benefit

time as male children, so that they too could get the education necessary for life in the public world; that the duty of support through alimony not be visited exclusively on husbands; that wives as well as husbands participate in the management of the community property; and that wives as well as husbands be eligible to administer their deceased relatives' estates.

Id. (citations omitted).

10. *See id.* at 17-28.

11. *Id.* at 21.

12. *Id.* at 28.

13. *See Cain, supra* note 5, at 265 ("Once women began to be treated like men, people began to notice that women really are not like men. Women are most noticeably not like men when they are pregnant."); *see also* Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

14. The Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k) (1981), amended Title VII by defining sex discrimination to include discrimination on the basis of pregnancy. The PDA was passed in response to the Supreme Court's notorious decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that discrimination on the basis of pregnancy was not sex discrimination under Title VII); *see also* *Geduldig v. Aiello*, 417 U.S. 484 (1974) (same holding, under Equal Protection Clause). Some feminists interpreted the PDA to prohibit pregnancy benefits, while others argued that the PDA did not disallow special treatment for pregnant workers. For helpful discussions of the debate among feminists concerning the meaning of the PDA, *see* Christine A. Littleton, *Reconstructing Sexual Equality*, in *FEMINIST LEGAL THEORY* 35, 38-39 (originally published at 75 CALIF. L. REV. 1279 (1987)); Wendy Williams, *supra* note 7, at 23-28. The Supreme Court arguably adopted the special treatment approach when it upheld pregnancy benefits under the PDA in *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

women.¹⁵ To the proponents of special treatment, however, ignoring physical differences in the name of formal equality means excluding from the economic and political marketplaces many women who cannot or will not fit the universal male standard.

The concept of women's difference soon expanded beyond biology and, for the first time, beyond the traditional liberal framework. This expansion occurred along two theoretical fronts, frequently referred to in the essays as dominance theory and relational feminism.¹⁶ Dominance theory is most closely associated with the work of Catharine MacKinnon and her view that feminists should focus on the issue of women's subordination rather than women's difference.¹⁷ It would be difficult to overstate the effect that MacKinnon's work has had on the continuing development of feminist legal theory. Her critique of the traditional liberal approach and its preoccupation with the question of real gender differences was devastating, and her alternative focus on male dominance and female subordination has proved to be powerful and disarmingly simple. Although MacKinnon rejects any approach that asks in what specific ways women are the same as or different from men, her theory is nevertheless premised on the fundamental difference of women's subordination.¹⁸ Whereas liberal feminists focus on a wide range of actual and perceived gender differences, for MacKinnon the only *real* difference—the only difference that matters—is that women are oppressed and men are their oppressors. In her view, male control over female sexuality is the primary source of women's subordination;¹⁹ accordingly MacKinnon has focused her attention, both as a scholar and as a lawyer, on such issues as rape, sexual harassment, and pornography.²⁰

Relational feminism refers to a more open-ended body of work, often associated with Carol Gilligan's psychological studies in moral reasoning. In

15. Wendy Williams, *supra* note 7, at 26.

16. Relational feminism is also often referred to as "cultural feminism." See, e.g., Cain, *supra* note 5, at 265; West, *supra* note 5, at 206. I prefer the term relational to cultural because I think it better captures the theory's emphasis on women's essential connectedness to other human beings, and because it avoids the implication that women's difference is a product of cultural forces alone.

17. See Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINIST LEGAL THEORY 81, 87 (originally published at CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987)) [hereinafter MacKinnon, *Difference and Dominance*]. MacKinnon first articulated her dominance theory in *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979). Dominance theory is sometimes placed within the broader category of radical feminism. Radical feminist writings outside the discipline of law include ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1979); SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION (1970). Alison Jaggar also includes the French feminist theorists Christine Delphy, Hélène Cixous and Luce Irigaray within the category of radical thinkers. See ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 98 (1983).

18. See Cain, *supra* note 5, at 265.

19. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in FEMINIST LEGAL THEORY 181, 186 (originally published at 8 SIGNS 635 (1983)).

20. See generally CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

her influential book, *In a Different Voice*,²¹ Gilligan argued that in resolving moral dilemmas women emphasize human connection and relationships, whereas men emphasize abstract rights and justice. Relying upon Gilligan's findings and similar psychological theories,²² relational feminists in the legal academy celebrate a female ethic of care and seek to integrate that normative ethic into the law. Among the authors in *Feminist Legal Theory*, for example, Robin West asserts that "[w]omen are more empathic to the lives of others because women are physically tied to the lives of others in a way which men are not."²³ She elaborates:

[W]omen value love and intimacy because they express the unity of self and nature within our own selves. More generally, women do not struggle toward connection with others, against what turn out to be insurmountable obstacles. Intimacy is not something which women fight to become capable of. We just do it. It is ridiculously easy. It is also, I suspect, qualitatively beyond the pale of male effort. . . . Gilligan inadvertently sums the difference between the community critical legal studies insists that men surreptitiously seek, and the intimacy that cultural feminism insists that women value: "The discovery now being celebrated by men in mid-life of the importance of intimacy, relationships, and care is something that women have known from the beginning."²⁴

With the goal of integrating a female perspective into law and the legal system, relational feminists advocate doctrinal reform in areas as diverse as child custody determinations and mass tort law.²⁵

Although dominance and relational theories differ wildly in their assessment of women's condition, both theories can be said to embody "standpoint epistemologies," for each makes a claim to "truth" based on women's particular standpoint or experience.²⁶ Central to both theories is consciousness-raising—a method by which women come to an understanding of themselves through small-group encounters, an understanding that in turn provides the basis for a communal feminist effort.²⁷ Dominance and relational

21. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

22. See MARY FIELD BELENKY ET AL., *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* (1986); NANCY J. CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY* (1989); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR* (1976).

23. West, *supra* note 5, at 211.

24. *Id.* at 221-22 (quoting GILLIGAN, *supra* note 21, at 17).

25. See Katharine Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848; see also Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CALIF. L. REV. 1011 (1989).

26. See SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* 26 (1986) (describing how "feminist standpoint" theories posit that the perspective of women provides "a morally and scientifically preferable grounding for our interpretations and explanations of nature and social life").

27. For a fuller elaboration of consciousness-raising and its relationship to scholarly narrative, see *infra* text accompanying notes 44-47.

theories differ, however, in their views of what women come to know of themselves through consciousness-raising. For dominance theorists, the essence of the female condition derives from the pain and deprivation of subordination; for relational feminists, on the other hand, the essence of womanhood lies in the joy of human connection.²⁸ Rape and birth, respectively, are their paradigmatic defining moments.

The focus of the feminist inquiries described so far has been on the relationship between men and women. "Asking the woman question" has meant asking in what way women's lives—epistemologically, physically, culturally—differ from men's, and how law does and should address that difference. Quietly at first, however, and then with increasing volume, some feminists have begun to challenge the notion of a distinct female voice or female culture. Women of color have raised a dissident cry against the totalizing nature of feminist theory. They reject the notion that the experience of all women can be reduced to a universal meaning or essence;²⁹ in their view, when feminist theory adopts such a reductive vision of women, it is simply oppression "in a different voice." As Kimberle Crenshaw writes: "The authoritative universal voice—usually white male subjectivity masquerading as non-racial, non-gendered objectivity—is merely transferred to those who, but for gender, share many of the same cultural, economic and social characteristics."³⁰

As a result of this anti-essentialist critique, "asking the woman question" assumes a new meaning; the focus of feminist inquiry shifts from the difference between men and women to the differences among women themselves. Most centrally, feminist questioning now takes account of the experiences of women of color. In Crenshaw's words, it recognizes the intersection of race and gender: "Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which black women are subordinated."³¹ Crenshaw's essay in this volume explores the doctrinal implications of her theory of intersectionality in the context of Title VII lawsuits.³²

28. See West, *supra* note 5, at 210-11; see also Dalton, *supra* note 5, at 7-8 (1988).

29. See ELIZABETH SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); see also BELL HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* (1984).

30. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, in *FEMINIST LEGAL THEORY* 57, 67 (originally published at 1989 U. CHI. LEGAL F. 139).

31. See *id.* at 58; see also Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

32. In one of the cases Crenshaw discusses, *De Graffenreid v. General Motors Assembly Div.*, 413 F. Supp. 142 (E.D. Mo. 1976), *aff'd in part and rev'd in part*, 558 F.2d 480 (8th Cir. 1977), a federal district court dismissed the claims of five plaintiffs on the ground that Title VII does not recognize discrimination against black women as a distinct class, see Crenshaw, *supra* note 30 at 59. In another, *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983), a federal appeals court refused to certify a black woman as class representative in a race and sex discrimination action, *id.* at 60. Cases such as

From the anti-essentialist perspective, however, recognizing the "particular manner in which black women are subordinated" cannot be enough. The category Black Woman is no less immune to charges of essentialism than the category of Woman generally. Thus, although it may have begun with the limited goal of broadening feminist theory to include the previously concealed dimension of race, the anti-essentialist effort has had a more radical effect, pushing us toward greater and greater particularity. Martha Minow, among others, admonishes that we must be sensitive to a wide variety of differences "beyond gender, such as religion, ethnicity, race, handicap, sexual preference, socioeconomic class, and age."³³ And to complicate matters even more, we must also be sensitive to the ways in which women and men are alike. Anti-essentialism means considering "how men nurture people and relationships and how women are competitive and powerful."³⁴ The critique collapses the "oppositional politics" of traditional feminism, which casts men in the role of antagonist,³⁵ and explores the delicate question of women's complicity in their own subordination.³⁶

Anti-essentialism ultimately challenges the authority of all standpoint epistemologies by denying that any particular perspective has a special claim to truth. No matter how carefully we parse the dimensions of difference, further distinctions will present themselves. A politics based on the connections among black women can splinter along lines of class; a politics based on the connections among black middle-class women can splinter along lines of sexual preference; a politics based on the connections among black middle-class lesbian women can splinter along lines of religion, and so on. What we seem to be left with after the anti-essentialist critique has exhausted itself is a politics of the self.

And not even that. Anti-essentialism has led some feminists beyond women's difference from men or from each other to reach fundamental questions concerning the unified nature of human identity. For many of the theorists in this volume, for example, identity or selfhood cannot fairly be viewed as a fixed transcendent whole, but is instead a socially-constructed mix of contradictory impulses and fears. As Angela Harris explains, we have not a single "self" but "a welter of partial, sometimes contradictory, or even antithetical 'selves.'"³⁷ In a creative and moving essay, Patricia Williams tells

these, according to Crenshaw, fail to account for the dimensions of black women's experience of discrimination.

33. Martha Minow, *Feminist Reason: Getting It and Losing It*, in FEMINIST LEGAL THEORY 357, 357 (originally published at 38 J. LEGAL EDUC. 47 (1988)).

34. Joan C. Williams, *Deconstructing Gender*, in FEMINIST LEGAL THEORY 95, 113 (originally published at 87 MICH. L. REV. 797 (1989)).

35. Crenshaw, *supra* note 30, at 70.

36. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in FEMINIST LEGAL THEORY 235, 254 (originally published at 42 STAN. L. REV. 581 (1990)).

37. *Id.* at 237.

the painful story of her coming to terms with the contradiction inherent in her ancestry. The descendent of both a white slave owner and an eleven year-old slave girl, Williams confronts the "profoundly troubling paradox" that self-knowledge requires her to "claim[] for [her]self a heritage the weft of whose genesis is [her] own disinheritance . . ."³⁸ Expressing a similar point in more academic terms, Katharine Bartlett writes that "the subject, including the female subject, has no core identity but rather is constituted through multiple structures and discourses that in various ways overlap, intersect, and contradict each other."³⁹

Taken to this extreme, the anti-essentialist critique would appear to "reject the limitations caused by *any* categorization."⁴⁰ Having been led to the epistemological abyss, however, the authors in this volume attempt to cross over. Faced with the disintegration of all categorical thinking, many feminists have begun to explore ways to pull the disparate pieces of self, woman, and feminism back together. How they aim to do this is the subject of the next Part of this Review.

II. THE NARRATIVE BRIDGE

Feminists are not alone in having arrived at a place where categorical thinking is suspect. Postmodern theorists, and particularly those theorists utilizing the analytic method of deconstruction, share a similar skepticism toward the notion that social categories possess a fixed, transcendent meaning, indeed that they possess any meaning outside the texts (or social contexts) that, according to the theory, create them.⁴¹ For postmodern theorists, the idea of Woman, like the idea of the Self, is socially constructed, produced by various, changing, and even contradictory social discourses, including the discourse of

38. Patricia J. Williams, *On Being the Object of Property*, in FEMINIST LEGAL THEORY 165, 166 (originally published at 14 SIGNS 5 (1988)); see also JUDITH FETTERLEY, THE RESISTING READER: A FEMINIST APPROACH TO AMERICAN FICTION xii (1978) (arguing that in much of American literature, "the female reader . . . is asked to identify with a selfhood that defines itself in opposition to her").

39. Bartlett, *supra* note 6, at 388.

40. Cain, *supra* note 5, at 268 (emphasis added).

41. See JACQUES DERRIDA, WRITING AND DIFFERENCE (Alan Bass trans., 1978); JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans, 1976); JULIA KRISTEVA, THE KRISTEVA READER (Toril Moi ed., 1986); JACQUES LACAN, *ÉCRITS: A SELECTION* (1977); see also JONATHAN CULLER, ON DECONSTRUCTION (1982). For an example of deconstructive analysis among the essays in this volume, see Clare Dalton, *Deconstructing Contract Doctrine*, in FEMINIST LEGAL THEORY 287 (originally published as *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985)). It is worth noting that some scholars hesitate to include the philosophy of deconstruction within the postmodern enterprise because, they believe, it continues to adhere to modernist ways of thinking, including oppositional patterns of thought. See, e.g., Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 652-53 (1990); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 313 n.276 (1992). The same can surely be said of early critical legal scholarship, which, although often aligned with deconstruction and postmodernism, is perhaps more fairly described as a "structuralist" endeavor. See, e.g., Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

law.⁴² Yet what distinguishes feminist legal theory from related postmodern thought is the route by which it arrives at this condition of uncertainty. Unlike the scholarly and at times vertiginous abstraction of postmodernism, feminist theory strives to remain anchored in the lived experiences of women. Narrative is both feminism's tool of critique and, as the essays in *Feminist Legal Theory* urge, its method of reconstruction.⁴³

Narrative is related to the feminist practice of consciousness-raising. Although the two terms are often used interchangeably, it is useful to draw out their different orientations. Especially popular during the 1970's,⁴⁴ consciousness-raising is "an interactive and collaborative process of articulating one's experiences and making meaning of them with others who also articulate their experiences."⁴⁵ The purpose of the practice is to enable individual women of all social backgrounds to come to a greater understanding of themselves and their social condition.⁴⁶ Narrative, on the other hand, is speech with a different objective. In contrast to the spontaneous, open-ended dialogue of consciousness-raising, narrative as practiced by feminist legal scholars is a supremely self-conscious art form. The stories feminists tell are sometimes autobiographical and sometimes true, but they are as often fictions and even fantasies.⁴⁷ Feminist narrative in law is literature with a political point.

The reconstructive power of narrative lies in its potential for arresting the infinite regress of the anti-essentialist critique. At its most profound, anti-essentialism leaves us weakened and dazed, paralyzed by self-doubt and

42. See DENISE RILEY, "AM I THAT NAME?" FEMINISM AND THE CATEGORY OF "WOMEN" IN HISTORY I (1988) ("From the side of deconstruction, Derrida among others has advanced what he calls the 'undecidability' of woman."); Judith Butler, *Gender Trouble, Feminist Theory, and Psychoanalytic Discourse*, in FEMINISM/POSTMODERNISM 324, 327 (Linda J. Nicholson ed., 1990) ("The destabilization of the subject within feminist criticism becomes a tactic in the exposure of masculine power and, in some French feminist contexts, the death of the subject spells the release or emancipation of the suppressed feminine sphere, the specific libidinal economy of women, the condition of *écriture féminine*."); Drucilla Cornell, *The Philosophy of the Limit: Systems Theory and Feminist Legal Reform*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 86 (Drucilla Cornell et al. eds., 1992) (discussing "illusion of consolidated identity"); Iris M. Young, *The Ideal of Community and the Politics of Difference*, in FEMINISM/POSTMODERNISM, *supra*, at 300, 310 ("The idea of the self as a unified subject of desire and need and an origin of assertion and action has been powerfully called into question by contemporary philosophers.").

43. Kathryn Abrams is correct to point out that "[f]eminist storytellers are not the first to use narratives in the context of legal scholarship." Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 973 (1991) (noting that legal historians, legal anthropologists, law and literature scholars, and critical race theorists have employed narrative). For a discussion of the limitations of scholarly narrative, see Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narrative*, 45 STAN. L. REV. (forthcoming Apr. 1993).

44. See, e.g., Bartlett, *supra* note 6, at 381-83.

45. *Id.* at 381; see also Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 519-20 (1982); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, in FEMINIST LEGAL THEORY 318, 321 (originally published at 61 N.Y.U. L. REV. 589 (1986)).

46. See, e.g., Bartlett, *supra* note 6, at 381; Schneider, *supra* note 45, at 321.

47. See, e.g., Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

schizophrenic impulses. We can reconcile these internal conflicts and achieve a comprehensive sense of identity by a process akin to storytelling. When we imagine our lives, integrating our experiences and emotions into a coherent story, we create ourselves whole. In her essay in this volume, Patricia Williams captures how the disintegration of self can be overcome through imaginative effort:

There are moments in my life when I feel as though a part of me is missing. There are days when I feel so invisible that I can't remember what day of the week it is, when I feel so manipulated that I can't remember my own name, when I feel so lost and angry that I can't speak a civil word to the people who love me best. Those are the times when I catch sight of my reflection in store windows and am surprised to see a whole person looking back. Those are the times when my skin becomes gummy as clay and my nose slides around on my face and my eyes drip down to my chin. I have to close my eyes at such times and remember myself, draw an internal picture that is smooth and whole; when all else fails, I reach for a mirror and stare myself down until the features reassemble themselves like lost sheep.⁴⁸

Angela Harris also expresses the view that "wholeness of the self and commonality with others are asserted (if never completely achieved) through creative action, not realized in shared victimization."⁴⁹

Narrative thus tempers the view that self or identity is created entirely by social discourse; it injects an element of individual will into the socially-constructed postmodern subject. Like the process of psychoanalysis, the practice of narrative recognizes that there is enough of a storyteller in all of us to create a coherent, if unstable self.⁵⁰ Yet the narrative speaker is not simply an outspoken incarnation of the pre-existing, bounded individual of modernist thought; she must contend with the social forces that continually threaten to destroy her carefully-crafted sense of self. For Julia Kristeva, for example, psychoanalysis enables the individual to achieve a tentative sense of wholeness and identity; analysis is a kind of narrative process that carries out the "difficult balancing act between a position which would deconstruct

48. Patricia Williams, *supra* note 38, at 173.

49. Harris, *supra* note 36, at 253.

50. As Terry Eagleton explains in his introduction to postmodern literary theory:

In conscious life, we achieve some sense of ourselves as reasonably unified, coherent selves, and without this action would be impossible. But all this is merely at the "imaginary" level of the ego, which is no more than the tip of the iceberg of the human subject known to psychoanalysis. The ego is a function or effect of a subject which is always dispersed, never identical with itself, strung out along the chains of the discourses which constitute it.

TERRY EAGLETON, *LITERARY THEORY* 169 (1983).

subjectivity and identity altogether, and one that would try to capture these entities in an essentialist or humanist mould.”⁵¹

Narrative plays a similar role in the reconstruction of the category Woman. The anti-essentialist critique is propelled by the stories women tell about their differing life experiences. Stories by and about women of color or lesbians, for example, document the multiplicity of female experience in a way inaccessible to abstract theory. And while these stories somewhat splinter the essential image of Woman, they do not, as postmodern theory threatens to do, shatter her altogether. At the point where postmodern theory might conclude “Woman no longer exists,”⁵² narrative steps in to recreate a meaningful sense of connection among women. The stories women relate expose common patterns of gender in a world of gender inequality;⁵³ they confirm that the experience of gender, albeit multifaceted, can tentatively, intermittently, yet distinctly cut across the varying differences that divide women. Narrative thus straddles the postmodern divide between a unified, essentialist meaning of womanhood and no meaning at all; the narrating self is a woman-in-process.⁵⁴ Narrative’s focus on women’s experience thus might be understood to reflect a pragmatic approach to the question of female meaning.⁵⁵ The power of narrative lies in

51. Toril Moi, *Introduction* to KRISTEVA, *supra* note 41, at 13.

52. See Julia Kristeva, *La femme, ce n'est jamais ça*, in *NEW FRENCH FEMINISMS* 137 (Elaine Marks & Isabelle de Courtivron eds., 1980). In this interview, Kristeva explains:

The belief that “one is a woman” is almost as absurd and obscurantist as the belief that “one is a man.” I say “almost” because there are still many goals which women can achieve: freedom of abortion and contraception, day-care centers for children, equality on the job, etc. Therefore, we must use “we are women” as an advertisement or slogan for our demands. On a deeper level, however, a woman cannot “be”; it is something which does not even belong in the order of *being*. It follows that a feminist practice can only be negative, at odds with what already exists so that we may say “that’s not it” and “that’s still not it.” In “woman” I see something that cannot be represented, something that is not said, something above and beyond nomenclatures and ideologies.

Id. at 137.

53. Marilyn Frye, *The Possibility of Feminist Theory*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 174, 179-84 (Deborah L. Rhode ed., 1990); see also Bartlett, *supra* note 6, at 392 (“From the positional stance, I can attain self-knowledge through the effort to identify not only what is different, but also what I have in common with those who have other perspectives.”); Cain, *supra* note 5, at 263 (“Women, as they listen to each other, tend to discover a commonality of experience.”); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989) (describing how stories of “outgroups” “create their own bonds, represent cohesion, shared understandings, and meanings”); Marion Smiley, *Gender Justice Without Foundations*, 89 MICH. L. REV. 1574, 1576 (1991) (describing postmodern feminists as “develop[ing] generalizations about women and other oppressed groups on the basis of their own experiences, rather than on the basis of universal truths”).

54. Cf. KRISTEVA, *Revolution in Poetic Language*, in KRISTEVA, *supra* note 41, at 90, 91 (referring to the “subject in process”).

55. Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1707 (1990) (“Pragmatism and feminism largely share, I think, the commitment to finding knowledge in the particulars of experience. It is a commitment against abstract idealism, transcendence, foundationalism, and atemporal universality; and in favor of immanence, historicity, concreteness, situatedness, contextuality, embeddedness, narrativity of meaning.”). As Radin acknowledges, however, feminism is not compatible with pragmatism’s conception of truth as defined by consensus. *Id.* at 1708; see also CULLER, *supra* note 41, at 153.

its ability to establish the commonalities necessary to sustain political movement.⁵⁶

Having rescued the category Woman from anti-essentialist oblivion, feminist narrative now can be employed for a variety of other reconstructive ends. Storytelling can be used to illustrate scholarly argument, reinforce social movement, persuade legal decisionmakers, or lobby for legislative reform.⁵⁷ Perhaps most importantly, the narrative effort helps to define and redefine the universe of feminist interests and aims by focusing on gender as only one strand within a broader web of social inequalities. In each case the use of storytelling reflects a belief that personal and situated narrative is central to a proper understanding of justice.⁵⁸

Lucie White's essay in *Feminist Legal Theory* illustrates with particular urgency the importance of the narrative approach to understanding the complex and profound problems of social inequality in this country. White tells of her experience as a legal aid lawyer working in a small North Carolina community, during which time she represented a woman whose benefits had been reduced by the county welfare department. At the administrative hearing on the reduction, White was surprised when her client, Mrs. G., departed from the testimony they had prepared. Declining to tell her story in terms most advantageous to her under the welfare laws, Mrs. G. instead insisted on testifying that she had used her public benefits to purchase Sunday shoes for her children.⁵⁹ In that unexpected moment, the bond of gender between attorney and client was strained if not broken by the unspoken currents of race, class, and culture separating the two women. White recognized, perhaps too late, that she had somehow failed to understand her client; "[h]er statement was a demand for meaningful participation in the political conversations in which her needs are contested and defined."⁶⁰ Initially puzzled by Mrs. G.'s performance at the hearing, White comes to see how she herself had tried to

56. See Moi, *supra* note 51, at 15 ("[S]ome concept of agency (of a *subject of action*) is essential to any political theory worthy of the name."); Riley, *supra* note 42, at 112 ("My own suggestions grind to a halt here, on a territory of pragmatism. I'd argue that it is compatible to suggest that 'women' don't exist—while maintaining a politics of 'as if they existed'—since the world behaves as if they unambiguously did.").

57. For an example of narrative's use in the context of legislative reform, consider the hearings on the effects of pornography held before the Minneapolis Zoning and Planning Commission. See Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607 (1987).

58. In this sense, narrative is part of a broader "call to context" in progressive legal scholarship. See Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2099 (1989) (attributing this phrase to Professor Frederick Schauer). The call to context rejects the perceived abstraction and objectivity of traditional legal thought. See, e.g., Cain, *supra* note 5, at 267 (referring to "postmodernism"); Joan Williams, *supra* note 34, at 97 (referring to the "new epistemology"). As a technique, feminist narrative participates in the "call to context" in its articulation of the specific, concrete, and complex forms of gender oppression.

59. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, in FEMINIST LEGAL THEORY 404, 414 (originally published at 38 BUFF. L. REV. 1 (1990)).

60. *Id.* at 418.

"script" the narrative of her client in a way that served her own professional and personal needs.⁶¹ Mrs. G's spoken story at the hearing unsettled White's expectations and forced her to reassess her relationship to her client. White's own essay—her written narrative—is a creative effort to raise questions concerning the broader relationship between complex social inequalities and the ideal of procedural justice.

A call to narrative is at least implicit in nearly all of the most recent essays included in *Feminist Legal Theory*. Many of the essays explicitly discuss the feminist need for narrative,⁶² and stories are scattered throughout the book.⁶³ To be effective, however, the call to narrative must do more than give voice to women's stories. The feminist reconstructive effort requires that the stories be heard; women's stories must be received with the creative understanding of an empathetic listener. Empathy in this context "enables the decisionmaker to have an appreciation of the human meanings of a given legal situation."⁶⁴ Narrative can transcend human difference only when the listener responds to the story of another by seeking out traces of her own experience. The empathetic listener uses her imagination to comprehend the speaker's difference, and this creative effort is what builds the human bridge between them.

III. EMPATHETIC LIBERALISM

Attention to difference has moved feminist theorists to develop a theme of "community across diversity."⁶⁵ Whereas some theorists see what women have in common as more important than their differences, the anti-essentialist effort elevates difference above commonalities. Indeed, in a neat theoretical twist, some anti-essentialists have come to view difference itself as our greatest commonality. As Deborah Rhode explains, "[t]he factors that divide us can

61. *Id.* at 416. Although Mrs. G. lost the hearing, three days later the country welfare department withdrew its claim. *Id.* at 414.

62. See Cain *supra* note 5, at 268; Dalton, *supra* note 41, at 298; Harris, *supra* note 36, at 255; Minow, *supra* note 33, at 365; Deborah L. Rhode, *Feminist Critical Theories*, in *FEMINIST LEGAL THEORY* 333, 334 (originally published at 42 *STAN. L. REV.* 617 (1990)); Schneider, *supra* note 45, at 321.

63. See, e.g., Cain, *supra* note 5; Crenshaw, *supra* note 30, at 69-70; Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, in *FEMINIST LEGAL THEORY* 124 (originally published at 103 *HARV. L. REV.* 1749 (1990)); White, *supra* note 59; Patricia Williams, *supra* note 38.

64. Lynne N. Henderson, *Legality and Empathy*, 85 *MICH. L. REV.* 1574, 1576 (1987). Henderson "rejects the assumption that legality—by which I mean the dominant belief system about the Rule and the role of Law—and empathy are mutually exclusive concepts." *Id.*; see also Bartlett, *supra* note 6, at 390 ("To be sure, I cannot transcend my perspective; by definition, whatever perspective I currently have limits my view. But I can improve my perspective by stretching my imagination to identify and understand the perspectives of others.").

65. See, e.g., Bartlett, *supra* note 6, at 392; Cain, *supra* note 5, at 268-69; Rhode, *supra* note 62, at 337; see also HOOKS, *supra* note 29, at 43-65 (urging political solidarity based on shared appreciation for female diversity); Young, *supra* note 42, at 317-20 (developing a politics of difference based on an ideal of the unoppressive city).

also be a basis for enriching our theoretical perspectives and expanding our political alliances.”⁶⁶ Many feminists now locate “the source of community in its diversity,”⁶⁷ affirming Frank Michelman’s paradoxical insight: “The human universal becomes difference itself. Difference is what we most fundamentally have in common.”⁶⁸

The question immediately arises in what way this feminist commitment to diversity differs from traditional liberalism,⁶⁹ since many of the early essays in this volume represent a self-conscious flight from “liberal legalism.”⁷⁰ In her 1983 essay “Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence,” for example, Catharine MacKinnon advocates a rejection of liberalism in favor of “radical feminism.”⁷¹ Similarly, Frances Olsen endorses a critical approach that goes beyond liberal legalism and allows us to “stop trying to fit our goals into abstract rights arguments and instead call for what we really want.”⁷² In addition, feminist commentators have interpreted relational feminism and its ethic of care as antithetical to the liberal values of autonomy and possessive individualism.⁷³ Yet despite these stated objections to traditional liberalism, much recent feminist theory has rallied around a principle of diversity that sounds suspiciously familiar.

As dominance and relational feminist theories have come under anti-essentialist attack, their critique of liberalism has at the same time appeared to wither. Recent feminist theorists have begun to take a more moderate look at contemporary liberalism, searching out ways to reshape and redirect liberal principles to serve feminist ends.⁷⁴ Deborah Rhode remarks upon feminism’s

66. Rhode, *supra* note 62, at 337. Rhode notes as well, “[w]e need understandings that can resonate with women’s shared experience without losing touch with our diversity.” *Id.*

67. Bartlett, *supra* note 6, at 392.

68. Frank Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 32 (1986), *quoted in* Bartlett, *supra* note 6, at 392.

69. By traditional liberal theory, I mean to refer generally to our dominant political tradition, premised upon a commitment to individual autonomy and individual rights, beginning with John Locke and continuing through to such contemporary political philosophers as John Rawls. For a general assessment of traditional liberal theory from a feminist perspective, see JAGGAR, *supra* note 17, at 27-50.

70. MacKinnon, *supra* note 19, at 186; Rhode, *supra* note 62, at 337-41; West, *supra* note 5, at 201-02. *But see* Wendy Williams, *supra* note 7. In a more recent article, Williams continues to defend traditional liberal feminism, under which “the most salient differences, the differences that matter most, are differences among women.” Wendy Williams, *Notes From a First Generation*, 1989 U. CHI. LEGAL F. 99, 105.

71. In her critique of liberalism’s fundamental norm of objectivity, MacKinnon argues that “[t]he liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender, through its legitimizing norms, relation to society, and substantive policies.” MacKinnon, *supra* note 19, at 186.

72. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, in FEMINIST LEGAL THEORY 305, 313 (originally published at 63 TEXAS L. REV. 387 (1984)).

73. *See, e.g.*, Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

74. *See, e.g.*, Linda C. McClain, “Atomistic Man” Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171 (1992); Robin West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990); *see also* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 101-09 (1989); Nedelsky, *supra* note 4.

ambivalence toward the critique of liberalism, noting that "many inequalities of greatest concern to feminists reflect limitations less in liberal premises than in efforts to realize liberalism's full potential."⁷⁵ In *Feminist Legal Theory*, Patricia Williams and Elizabeth Schneider both reassess, from the perspective of the disempowered, the critical scholars' attack on liberal rights. Along with other theorists, they question whether liberal rights really are as alienating and meaningless as the critical scholars contend.⁷⁶

The emerging feminist vision of community across difference does in some ways resemble liberalism's vision of a community of autonomous individuals. Both liberalism and this new feminism view with skepticism the notion of shared values transcending individual differences. Recent feminist theory, like liberalism, is suspicious of political visions of the good life that elevate community consensus over individual desires and needs.⁷⁷ To the extent some feminist theorists have come to embrace "plurality, diversity, and difference,"⁷⁸ they express a strong ambivalence toward communitarian politics.⁷⁹ Communitarianism assumes a categorical common ground; the denial of difference implicit in its appeals to community values and identity leads, from an anti-essentialist perspective, to political oppression.⁸⁰

Feminist theory's growing distrust of communitarian politics implies a corresponding appreciation for individual autonomy. Yet, because of its association with "selfish" individualism, feminists have long viewed the concept of autonomy as antithetical to feminist values. As some theorists have begun to point out, however, autonomy need not entail a politics of self-interest when it is understood to mean individual self-determination.⁸¹ In feminist terms, autonomy can signify women's ability and opportunity to be self-governing. This aspect of individual autonomy has long characterized some feminist thought: "The roots of both [feminism and liberalism] lie in the emergence of individualism as a general theory of social life; neither liberalism nor feminism is conceivable without some conception of individuals as free and equal beings, emancipated from the ascribed, hierarchical bonds of

75. Rhode, *supra* note 62, at 337.

76. Schneider, *supra* note 45; Patricia Williams, *supra* note 47; see also MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 267-311 (1990); Rhode, *supra* note 62, at 342.

77. See Cain, *supra* note 5, at 269 ("A normative principle that honors only what I have in common with each of you fails to respect each of you for the individual woman that you are.").

78. *Id.* at 267 (quoting ROSEMARIE TONG, FEMINIST THOUGHT: A COMPREHENSIVE INTRODUCTION 219 (1989)).

79. "Communitarianism is a loosely defined philosophy that values particular ways of life and subcommunities and simultaneously challenges the neutral pretenses of the liberal state." Nomi M. Stolzenberg, "He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581, 648 (1993).

80. See Young, *supra* note 42, at 302 ("[T]he ideal of community participates in what Derrida calls the metaphysics of presence and Adorno calls the logic of identity, a metaphysics that denies difference."). Not surprisingly, relational feminism has shown some sympathy toward the idea of political community founded upon women's values. See Sherry, *supra* note 73.

81. See McClain, *supra* note 74, at 1175-76; Nedelsky, *supra* note 4.

traditional society.”⁸² Over the last 150 years, feminist activists have worked to dissolve “the impoverished forms of ‘community’ forced on women”⁸³ by increasing women’s emotional, material and political independence.⁸⁴

The concept of autonomy as self-governance or self-determination need not contradict the feminist insight that we are each profoundly shaped by social forces. From a feminist perspective, traditional liberalism “denies difference by positing the self as a solid, self-sufficient unity, not defined by or in need of anything or anyone other than itself.”⁸⁵ To the extent that liberalism concedes the socialization of children by their parents, this socialization process is understood to be complete by the age of majority, when the liberal individual—now rational and fully self-sufficient—assumes the privileges of citizenship.⁸⁶ Skeptical of this view, feminists understand instead that the self is constituted, at all times, by a continuing dynamic interaction with social forces. Yet feminist theorists also recognize that the socially-constructed self is not complete. The feminist self is more than the passive intersection of social forces; she is a “resisting reader,”⁸⁷ struggling against the felt oppression of traditional male discourse.⁸⁸ As a critic of existing gender relations, she stands at least some distance apart from and independent of the world she criticizes.⁸⁹ And when that resisting female self engages in the

82. CAROLE PATEMAN, *THE DISORDER OF WOMEN* 118 (1989); see also OKIN, *supra* note 74, at 61 (“[A]s many feminist theorists recognize, a number of the basic tenets of liberalism—including the replacement of the belief in natural hierarchy by a belief in the fundamental equality of human beings, and the placing of individual freedoms before any unified construction of ‘the good’—have been basic tenets in the development of feminism, too.”).

83. Olsen, *supra* note 72, at 313; see Rhode, *supra* note 62, at 338 (“Some concept of autonomy has been central to the American women’s movement since its inception, autonomy from the constraints of male authority and traditional roles.”).

84. Among the many advances have been the enactment of Married Women’s Property Acts in every state, beginning with Mississippi in 1839, see LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 40-41 (1969), and the passage of the Nineteenth Amendment.

85. Young, *supra* note 42, at 307. Although critics of liberalism often cite John Rawls’ work for this proposition, see JOHN RAWLS, *A THEORY OF JUSTICE* 560 (1971) (asserting that “the self is prior to the ends which are affirmed by it”), some commentators suggest that Rawls may have since moderated his earlier view of individual identity. See Stolzenberg, *supra* note 79, at 648 n.372. Deborah Rhode argues that, to the extent feminism embraces the postmodern view of “the importance of social relationships in shaping individual preferences,” it is incompatible with “standard liberal techniques.” Rhode, *supra* note 62, at 338-39. Although Rhode may be correct with respect to traditional liberal theory, she herself implies that the principles of liberalism may be expansive enough to accommodate the feminist vision of a socially-constructed self. See *id.* at 337.

86. In a forthcoming article, I discuss the constitutional implications of liberalism’s traditional recognition of parental rights over children. Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 *TULANE L. REV.* (forthcoming Mar. 1993).

87. See FETTERLEY, *supra* note 38.

88. See CULLER, *supra* note 41, at 61.

89. Even those theorists, such as Catharine MacKinnon, who are most insistent that women’s way of knowing has been constructed by a patriarchal culture must nevertheless account for the subversive existence of feminist thought itself. See MacKinnon, *Difference and Dominance*, *supra* note 17, at 86:

I do not think that the way women reason morally is morality “in a different voice.” I think it is morality in a higher register, in the feminine voice. Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men. Further, when you are powerless, you don’t just speak differently. A lot, you don’t speak. Your speech is not just

creative process of ordering the conflicting social forces within her, when she narrates the direction that her life will take, she is self-governing.⁹⁰

In her insightful discussion of *EEOC v. Sears, Roebuck & Co.*,⁹¹ Vicki Schultz illuminates the feminist ideal of self-government. Her analysis of the lack-of-interest defense in employment discrimination cases rejects both the view that women enter the workforce with preexisting, fully formed job preferences, and the view that women's preferences are perfectly dictated by society. Instead, Schultz explores the ways in which women's job preferences are molded to a large extent by the workplace structure itself. She finds that when women in traditional female jobs were recruited for positions normally held by men, their sense of self changed: "Once they began doing nontraditional jobs, these women became highly motivated workers who defined work as a central life interest and who valued the intrinsic aspects of their work."⁹² Schultz proposes to change workplace structures so as to increase women's power of self-determination. And with her stories of women in the workplace, she uses narrative to achieve this goal. Through the stories women tell of their own work experience,⁹³ Schultz hopes to "bring a new sensitivity to the way judges exercise their responsibility" to evaluate the claim that women choose traditional work patterns.⁹⁴ She does not seek to impose a better choice on women holding traditional female jobs, nor does she abandon them to the choices they have already made. Instead, she uses their

differently articulated, it is silenced. Eliminated, gone.

For a tense exchange of views on this matter, see the discussion between Catharine MacKinnon and Mary Dunlap in Ellen C. DuBois et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 75 (1985). Dunlap said:

I am speaking out of turn. I am also standing, which I am told by some is a male thing to do. But I am still a woman—standing.

I am not subordinate to any man! I find myself very often contesting efforts at my subordination—both standing and lying down and sitting and in various other positions—but I am not subordinate to any man! And I have been told by Kitty MacKinnon that women have never *not* been subordinate to men. So I stand here an exception and invite all other women here to be an exception and stand.

90. The feminist critique of liberal individualism is similar to the critique of individual identity developed by communitarian theorists. See MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 150 (1982); see also STEPHEN MULHALL & ADAM SWIFT, *LIBERALS AND COMMUNITARIANS* 10 (1992) ("For the communitarian, the liberal picture of the person as someone separate from her conception of the good ignores the extent to which people are constituted as the people that they are precisely by those conceptions themselves."); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 764 (1989) ("[Under republicanism], a person's identity is understood not as prior to but rather as defined by his intimate relations, his community, and his deepest values."). Although recent feminist theory and civic republicanism share a similar vision of the relationship between the individual self and the community (as well as a similar interest in dialogue), republicanism nevertheless is incompatible with the anti-essentialist principles of recent feminist theory. See *infra* text accompanying notes 99-102.

91. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988) (Title VII lawsuit brought by the Equal Employment Opportunity Commission challenging Sears' sex-segregated job categories). The district court held that Sears had proved that the sex segregation resulted from women's preferences and not from discrimination. See *id.* at 1305-15; see also Schultz, *supra* note 63, at 125.

92. Schultz, *supra* note 63, at 136.

93. *Id.* at 135-40.

94. *Id.* at 141.

stories in an effort to increase legal understanding of the ways in which women's choices are channeled by the structure of the workplace itself.

Despite its commitment to individual autonomy, then, the feminist principle of difference is not simply a reiteration of liberal diversity with an emphasis on women and other oppressed groups.⁹⁵ In my view, anti-essentialism and the reconstructive insights of narrative give feminism the potential to make a distinct contribution to the ideal of political community across differences. The possibility of human connection through empathetic narrative can direct feminism toward a politics based on more than the aggregate pursuit of individual ends. Feminist theory can help us to recognize that we are not alienated souls coming together in a spirit of empty pluralism, but individuals profoundly connected in infinitely complex ways. Through narrative, the feminist vision of human connection offers liberalism the possibility of political union built upon bonds deeper than self-interest.

The possibility of political union derived from empathetic understanding has implications for the liberal principle of toleration. Traditional liberalism values negative liberty; it assumes that recognizing individual difference necessarily leads to a principle that allows each individual the maximum freedom to act undisturbed by others. Yet the principle of toleration employed by traditional liberalism ignores the important connections among individuals.⁹⁶ Liberal toleration implies critical distance;⁹⁷ when I tolerate the actions of another, I leave him alone. A feminist politics built upon narrative can replace the critical distance of "empty tolerance"⁹⁸ with empathetic understanding. This renewed feminist politics should demand more than our passive endurance of others' differences; it should ask us to engage with others by actively seeking to understand those differences in a way that resonates with our own experience.

The narrative effort in feminist theory resonates with the concept of public dialogue popular in contemporary legal scholarship on civic republicanism. Cass Sunstein, for example, has argued that the ideal of the common good in republican theories "depends on a commitment to political empathy, embodied in a requirement that political actors attempt to assume the position of those who disagree."⁹⁹ From this perspective, both feminist and republican theories might be understood to promote meaningful political connection through

95. It is not, therefore, merely a stronger version of traditional liberal feminism, under which women seek access to the same rights accorded men. *See, e.g.*, Wendy Williams, *supra* note 7. For a brief history of traditional liberal feminism in this country, see DEBORAH L. RHODE, JUSTICE AND GENDER 9-50 (1989).

96. Some commentators contend that a commitment to empathetic dialogue can be found in the liberal theory of Rawls. *See, e.g.*, McClain, *supra* note 74, at 1208; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1555 n.82 (1988).

97. *See* Stolzenberg, *supra* note 79, at 647-48.

98. MacKinnon, *supra* note 19, at 197.

99. Sunstein, *supra* note 96, at 1555 (citation omitted).

empathetic dialogue or narrative.¹⁰⁰ It might even be possible to construe the feminist commitment to storytelling as a form of civic virtue. Yet republican dialogue is a method that aims to articulate a common good; it seeks political consensus on substantive ends. Because of its commitment to a politics of diversity, feminist narrative is compatible with only the weakest version of civic republicanism, under which "the common good" means little more than pluralist compromise. Although Cass Sunstein advances a "liberal republican" theory that is attentive to issues of social plurality and that "incorporates central features of the liberal tradition," he remains loyal to a notion of "universalism," according to which at least "some questions can yield general agreement through deliberation."¹⁰¹ Even his relatively limited notion of the common good is at odds with the feminist anti-essentialist insight into human differences.¹⁰² At the moment republican consensus on the common good is reached, feminist narrative will enter to register a dissenting point of view.

There is a tendency, I believe, to dismiss feminist proposals for a more empathetic justice as too gentle and subdued an approach for the harsh and demanding world of law and politics.¹⁰³ The image conjured is one of leisurely and loving kindness, as between a parent and young child. Properly conceived, however, the narrative process is anything but soft and gentle. At its strongest, narrative acts as a profoundly destabilizing, subversive force in public deliberation. The voice of narrative is often loud, angry, disruptive. It aims as often to shatter the illusion of similarity as to build upon differences.¹⁰⁴ Feminist narrative might be understood as a truly "feminine" force in law; like the category "woman" itself, narrative can serve to destabilize prevailing legal discourse by promoting the stories of those whom law fails to recognize and protect.¹⁰⁵

Although antithetical to a strong vision of the common good, a feminist politics of diversity is nevertheless *feminist*, by which I mean it does exhibit consensus on certain foundational ideals, in particular the ideal of ending women's subordination. Yet like traditional liberalism, a feminist politics will be pluralistic in the elaboration of its foundational ideals; it will reflect the

100. See Michelman, *supra* note 68, at 19 ("Republicanism favors a highly participatory form of politics, involving citizens directly in dialogue and discussion . . .").

101. Sunstein, *supra* note 96, at 1541, 1555 (citation omitted). For a discussion of the affinities and differences between classical liberalism and civic republicanism, see Stolzenberg, *supra* note 79, at 651-60.

102. See Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1718 (1988) ("Affirming ongoing differences among involuntary groups appears a fatal concession [for republican theory], undercutting the republican project of pursuing, even aspirationally, a unitary common good.").

103. Lynne Henderson explores other reasons for the rejection of empathy in law. See Henderson, *supra* note 64, at 1576-77.

104. One of the most potent examples in *Feminist Legal Theory* of narrative's power to shatter the illusion of similarity, this time among women, is Patricia Williams' "unseemly . . . image of a black child sucking for its life from the bosom of a white woman." Patricia Williams, *supra* note 38, at 172.

105. See Cornell, *supra* note 41, at 680 ("The Law rests on the repressed underside of the feminine which, even when held down, continues to disrupt the purported unity of the law."); see generally articles collected in *NEW FRENCH FEMINISMS* (Elaine Marks & Isabelle de Courtivron eds., 1980).

range of views immanent in its diverse citizenry. In my view, feminist theory must take seriously the goal of reclaiming liberalism by incorporating the ideal of empathetic narrative. A recognition of social diversity need not mean that we must resign ourselves to a politics of toleration and self-interest; instead, we can seek to reconstruct the liberal ideal we already have in an attempt to realize its full emancipatory potential.

How would this renewed feminist liberalism play itself out in the real world? At a minimum, feminists must strive to tell and disperse stories by and about women of all social backgrounds, and in particular to encourage an emphasis on female storytelling in the professional spheres of journalism, law, and politics. Our commitment to increased narrative in the public realm offers the hope of improving the empathetic understanding of listeners with power, be they legislators, judges, administrators, or social leaders. Perhaps one might be inclined to dismiss as anomalous the first story of date rape, but it grows increasingly more difficult and uncomfortable to dismiss out of hand the tenth, or the hundredth, or the thousandth. Because of the emphasis on storytelling already embedded in legal culture, law is particularly well-suited for becoming a vehicle for empathetic understanding; to litigate a case is already to practice the art of narrative. Although experienced at storytelling, feminists themselves must also become skilled in empathetic listening. This means, for example, that white women must consider the perspectives of women of color, and that all feminists must consider the perspectives of men as well as nonfeminist women.

Empathetic liberalism would signal an end to oppositional politics and social arrangements. As Lucie White and her client Mrs. G. discovered,¹⁰⁶ we can no longer assume an easy alliance premised on the unitariness of the category Woman, or constructed in opposition to the category Man. Yet an empathetic approach to differences need not result in our being persuaded by the other's point of view; it need not signal the total inclusion characteristic of assimilation. Cultural traditions related to gender, race, or religion can continue to flourish, but the social and political groups that sustain them must be awakened to the diversity of their participants' allegiances. Empathetic liberalism seeks to mediate the solipsistic tendency of traditional liberal individualism by helping all of us to become outspoken, engaged, and equal citizens.

IV. CONCLUSION: READING THE FEMINIST CANON

The principle of difference developed by feminist theory teaches us that there can be no definitive body of feminist work. Having known exclusion at the hands of the traditional "masculinist" academy, feminist scholars should be particularly skeptical of efforts to identify a Grand Theory or the Great Works

106. See *supra* text accompanying notes 59-61.

in any given discipline, including our own. We have learned that there cannot and should not be a fixed feminist canon. And yet *Feminist Legal Theory* is it, at least for now. And, as this Book Review testifies, what a useful, well-organized and provocative canon it is. Katharine Bartlett and Rosanne Kennedy have done an excellent job of creating an inclusive anthology containing many of the best-known essays by feminist legal theorists. While any anthology represents an “impoverishing exercise”¹⁰⁷ by reducing a subject’s universe to a few token works, *Feminist Legal Theory* offers a relatively rich and varied selection.¹⁰⁸ The essays themselves are well edited and filled with the insights of interdisciplinary study as they move from abstract theory to personal narrative to doctrinal analysis, a layered presentation of feminist legal techniques and ideas.¹⁰⁹ Although *Feminist Legal Theory* cannot be considered the definitive text, nor in itself a sufficient text, for the full study of feminist legal thought, the variety and scope of its essays provide a rich foundation for the identification and exploration of feminist themes and aspirations.

One of the most salient and important themes to emerge from the writing in the volume is a theme closely related to the liberal principle of diversity. I have suggested in this review that the essays in *Feminist Legal Theory*, read together, signal an emerging commitment among feminist legal scholars to the renewal and reconception of liberal theory. The theory of empathetic liberalism offered in broad strokes here is only the beginning of such an endeavor. The self-conscious exploration of the similarities and connections between liberalism and feminism remains to be done. It is work that will require careful sensitivity to differences not only between but within each of those disciplines. For now, however, *Feminist Legal Theory* has given us the place from which to begin this venture, and enough of a theoretical map for us to chart a journey toward a far-off destination of full social equality.

107. Dalton, *supra* note 41, at 297.

108. In addition, the editors have included suggestions for further reading at the end of each of the three parts of the book, which serves to emphasize the representative nature of the chosen essays as well as turning the book into a valuable, if necessarily dated, research tool.

109. It must be emphasized, however, that the book limits itself to *legal* techniques and insights. Although many of the essays borrow from other disciplines, they are all law review articles written by women law professors. To this extent, *Feminist Legal Theory* might be considered a conservative anthology; it declines to “explode[]” the category of legal theory to include scholarly work by feminists in other disciplines, not to mention short stories, poems, pictures, or writings by men. Katharine T. Bartlett & Rosanne Kennedy, *Introduction* to FEMINIST LEGAL THEORY 1, 2.